the nature of things, place some reliance in the integrity of their counsel, and of the courts. The universal practice of trial courts in hearing the whispered arguments of counsel as to the relevancy of testimony is pointed out in the dissenting opinion. It is difficult to see any substantial difference between that proceeding, and the proceeding complained of in the principal case.

With all due consideration for personal rights and liberties, the courts should remember that even criminal cases have two sides. A rule of law which requires the court to send a case back for a new trial, with its attendant expense and delay, when it is perfectly evident that in the first trial there was nothing which could possibly have prejudiced the defendant, seems to be worthy of some consideration whenever it is presented, and if the courts are to meet the emphatic demands of the present age they should not hesitate to overturn technical rules of procedure which clearly prevent the proper administration of the law, and which have nothing to recommend them, except the fact that they appear to be "established." J. M. H.

MAY A DEFAULT DECREE BE GIVEN GRANTING RELIEF WITHOUT REDUCING THE EVIDENCE TO WRITING.—It has been said that an affirmance by an equally divided appellate court is really no affirmance at all, as it merely leaves undisturbed the findings of the court below. The question involved, however, when so presented, is always bound to be one of great interest and therefore to warrant some discussion concerning the matters involved. In *Duncan* v. *Duncan,* (So. Car., 1913), 76 S. E. 1099, a suit was brought by a wife to compel her husband to account to her for the rents of her real estate collected by him, and to enjoin him from interfering with her property. The defendant interposed two separate frivolous defenses which were stricken out. Thereupon judgment was rendered for the plaintiff by default, and damages were granted to the plaintiff in the sum of $1051, upon testimony which was not reduced to writing. The defendant moves the higher court for a new trial on the ground that the findings were against the weight of the evidence. In favor of affirmance, it was held by HYDRICK, J. and WOODS, J., that a default decree granting relief could be entered without reducing to writing the testimony to support it. WATTS, J. and FRAZER, J. dissented, and GARY, C. J. was disqualified.

In support of the opinion in favor of affirmance on this point, no cases are cited, and the dissenting opinion is equally barren in that regard. A search through the authorities has also further failed to disclose any case directly in point. The opinion in favor of affirmance proceeds on the broad general ground that a court of appeal will indulge every presumption of fact in favor of sustaining the court below. This presumption prevails "if there is any substantial legal evidence upon which it may be seen that the findings of fact in question, aided by every reasonable inference, could, with reason, have been based; unless it also appears that the court below failed to duly consider proper evidence which was not admitted, or was unduly influenced by the admission of improper evidence", 3 CYC. 308, and cases cited; *Turner*

v. *Burr,* 141 Mich. 106; *Zwiebel* v. *Schestedt,* 88 Neb. 100; *Patterson* v. *Trust Co.,* 230 Ill. 334. "The judgment will be presumed to have been fully supported by express findings which are not in the record," 3 Cyc. 311 and cases cited, *Fitzgerald* v. *Bassford,* 142 Fed. 134; *Daily* v. *Fitzgerald,* (N. Mex.), 125 Pac. 625. However the dissenting opinion thought that "the practice of granting decrees where testimony is required, unless that testimony is reduced to writing and perpetuated in some permanent form, and where the damages claimed are unliquidated, even though a default is made by a failure to answer, is not to be commended. "Even under these circumstances, * * * the party defaulting, if he saw fit to exercise the right, could appear and cross examine the witnesses put up to establish facts required to be proven to obtain judgment."

The same conflict noted in the principal case extends, as we would expect, into the cases founded upon a parity of surroundings; for example,—a final judgment on default may be rendered on an unliquidated demand, the defendant having been notified in the summons of the amount for which the plaintiff will take judgment, and it is not necessary to resort to a writ of inquiry,—*Hartman* v .*Williams,* 4 Cal. 254; *Ledbetter* v. *Vinton,* 108 Ala. 644; *Clemson* v. *State Bank,* 2 Ill. 45; *Dent* v. *Morrison,* 1 Mo. 130. On the other side of the same question—i. e. in an action on open account judgment should not be rendered by default save a writ of inquiry be first had, see, *Witt* v. *Long,* 93 N. C. 388; *City of Guthrie* v. *Lumber Co.,* 5 Okl. 774; *Cooper* v. *Roche,* 36 Md. 563; *Evans* v. *Parks,* 10 Ark. 306; *Wright* v. *Williams,* 2 Wend. 632; *Shelton's Exr's* v. *Walsh's Adm's.,* 7 Leigh, (Va.) 175. As to the question whether damages on a judgment may be assessed without a jury or not, there is likewise conflict: on the affirmative side being, *Smith* v. *Billett,* 15 Cal. 23; *Bowman* v. *Noyes,* 12 N. H. 302; *Armstrong* v. *Catlin,* 17 Ia. 581; *Rogers* v. *Brundred,* 16 N. J. Law 159; and on the negative, *Clarke* v. *Pratt,* 20 Ala. 470; *Campbell* v. *Wollen,* 5 Blackf. 80; *Averill Coal Co.* v .*Verner,* 22 Oh. St. 372; *Mississippi* v. *Green,* 56 Tenn. 588. On facts quite similar to those in the principal case it is held that a judgment for damages will not be disturbed on appeal, save the complaint is wholly insufficient in substance to support it, *Railroad Co.* v. *Hungerford,* 75 Conn. 76. So quite similarly in *Mitchell* v. *Allen,* 110 Ga. 282. After default the burden rests upon the defendant to prove any facts which would show that he was free from liability, *Barnhard* v. *Curtis,* 75 Conn. 476.

In the principal case the opinion in favor of affirmance may have been influenced to some extent by the fact that the defendant interposed frivolous matters of defense, for a party who seems disposed to delay and to introduce defenses of a technical nature not going to the merits of the cause, no longer meets with favor in the eyes of the law. The earlier matter is interposed not going to the main ground of the defense, the better chance it has of receiving favorable consideration, *Railroad Co.* v. *Crump,* 102 Tex. 250; *Kramer* v. *Weigand,* 88 Neb. 392; *Myers* v. *Schneider,* 21 Mo. 77; *Mountz* v. *Apt,* 51 Col. 491; *Ambler* v. *Leach,* 15 W. Va. 677; *Railway Co.* v. *Groom,* 142 Ky. 51. The prevailing opinion would seem to have a tendency to add greatly to the discretion of the trial court, the appellate court appearing to

have waived any right to reverse on appeal where the evidence is not in writing—no matter how flagrant the abuse may have been in the trial court upon the admission or rejection of evidence, or in determining the weight thereof. However as a matter of practice, in any case involving a considerable sum, the evidence is usually reduced to writing, and so an appeal might be taken on it on the ground that the findings were against the weight of the evidence; while in cases involving only small amounts, courts will not as a rule grant new trials in any event, *"de minimis non curat lex," Buddington* v. *Knowles,* 30 Conn. 26; *Hyatt* v. *Wood,* 3 Johns. 239; *York* v. *Stiles,* 21 R. I. 225. W. W. M.

THE RIGHT OF CHANGE OF VENUE ON MOTION BY THE STATE.—The right of the prosecution in a criminal action to move for a change of venue presented itself in the recent case of *Glinnan et al.* v. *Phelan, Judge* (Mich. 1913), 140 N. W. 87. The court in order to reach its conclusion virtually overruled its former holdings on two points, namely, the right of the state to move for a change of venue and the remedy for erroneously ruling in such matters. Glinnan and nine other aldermen of the City of Detroit were charged with the crime of bribery, and after a plea of not guilty was entered the prosecuting attorney for Wayne county presented affidavits to the effect that the state could not secure a fair and impartial jury and asked for a change of venue to some other county, which was granted over the relators' objections. The relators sought a writ of mandamus in the supreme court requiring the trial court to vacate its order and to proceed with the trial. By a vote of four to three, the court granted the writ. The point upon which the majority agreed was that the state cannot be granted a motion for a change of venue over the accused's objections without there first being an effort to obtain a jury, and that such error was subject to review by mandamus. Two of the judges were in favor of completely overruling the cases of *People* v. *Peterson,* 93 Mich. 27, and *People* v. *Fuhrman,* 103 Mich. 593 holding the state can move for a change of venue, while the other two judges reconciled the cases on the ground that an effort had been made to obtain juries in the earlier cases. But all agreed that the case of *Lyle* v. *Circuit Judge,* 157 Mich. 33, which held that any alleged error in a ruling on a change of venue was subject to review only on appeal by writ of error, should be so modified as to permit a review by mandamus. The three dissenting judges were satisfied that the cases of *People* v. *Peterson* and *Lyle* v. *Circuit Judge, supra,* were the settled law for Michigan.

Whether the right to a change of venue is a common law right or purely statutory, is a question upon which there is irreconcilable conflict. In the recent case of *Crocker et al* v. *Justice of Superior Court* (1911) 208 Mass. 162, 94 N. E. 369, 21 Ann. Cases 1061, the court, after a very exhaustive review of the American and English cases, said, "The great weight of authority supports the view that it is an inherent power of the common law to order the change for purposes of securing a fair trial." And the case of *Reg.* v. *Conway,* 9 Ir. C. L. 507, held, "there is another common law right equally open to the defendant and prosecutor, that when it appears that either